Skrine (claiming as a firm) v NS Water Consortium Sdn Bhd

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO NA-24NCVC-175–07 OF 2017
AZIZUL AZMI ADNAN J
18 NOVEMBER 2020

Legal Profession — Remuneration — Bill of costs — Defendant appointed senior partner of the plaintiff to act as lead counsel — Whether there was an agreement in writing to pay legal fees on time cost basis and in accordance with billing policies of firm — Whether time incurred by other lawyers chargeable — Whether charges of preparation for trial and for attendance at trial were grossly excessive — Whether there were overlaps in items specified in the bills — Whether bills sufficiently particularised — Whether charges of preparation for trial and, attendance at trial and after trial submissions were grossly excessive — Whether plaintiff not entitled to charge for the travelling time incurred by lead counsel on a time cost basis — Rules of Court 2012 O 59 rr 16, 17 — Legal Profession Act 1976 ss 116, 126(3)

This was an appeal against the decision of the deputy registrar for the claim of taxing of a solicitor's bills to its own client via originating summon to tax bills to the defendant being the services rendered by the plaintiff, a law firm. The defendant had appointed a senior partner of the plaintiff to act as lead counsel to act for it in connection with a suit that it had instituted against (among others) the state of Negeri Sembilan for breach of a contended water supply concession. The plaintiff had issued bills to the defendant in connection with plaintiff's senior counsel's engagement as lead counsel. 12 of these bills were paid by the defendant, the aggregate sum of which was almost RM300,000. There were 17 further bills that were issued by plaintiff which remained unpaid. The sum of these 17 outstanding bills was RM733,096.22. The parties attempted to come to a settlement for the outstanding bills. Although both parties were willing to settle on a payment of RM500,000 by the defendant to the plaintiff, they could not agree on the legal consequence should the defendant default on this settlement. The plaintiff claimed for the whole amount of the outstanding bills in the event of breach by the defendant of the settlement terms. The defendant, on the other hand, was only ever willing to pay RM500,000, regardless of whether it adhered to the settlement terms. Due to the disagreements on the settlement terms, plaintiff commenced this originating summons. On 17 June 2018, the High Court determined, inter alia, that the taxation exercise would be conducted in respect of the 17 outstanding bills, that these bills were to be taxed on a solicitor-client basis in accordance with O 59 rr 16 and 17 of the Rules of Court 2012 and s 126(3) of the Legal Profession Act 1976, and that the bills were to be taxed by the deputy

registrar of the court. On 1 March 2019, the deputy registrar determined that the whole amount of the outstanding bills was due and payable to plaintiff. The learned deputy registrar found, inter alia, that the defendant had represented to plaintiff that it would pay the amounts in the outstanding bills on an instalment basis, and that the defendant was merely attempting to evade its legal obligation by claiming that some of items in the bills were unreasonable and that there were overlapping items on the bills. Thus, the issues to be determined were as follows: (a) whether there was no agreement in writing between parties to pay legal fees on a time cost basis and in accordance with the billing policies of the firm; (b) whether time incurred by other lawyers was chargeable; (c) whether there were overlaps in items specified in the bills; (d) whether charges for emails, correspondence and conferences were excessive and ought not be allowed; (e) whether charges for two interlocutory applications were unreasonable and excessive; (f) whether charges of preparation for trial, attendance at trial and after trial submissions were grossly excessive; (g) whether the bills were sufficiently particularised; and (h) whether the plaintiff was not entitled to charge for the travelling time incurred by lead counsel on a time cost basis.

Held, dismissing the appeal with costs to the defendant:

(1) The court was of the view that the deputy registrars' logic behind his reasoning for finding that the contentions of the defendant was without merit, was erroneous. The fact that the defendant had paid the 12 earlier bills does not mean that none of the items in the subsequent 17 bills were tainted with unreasonableness. Similarly, the defendant may have been prepared to come to a settlement with the plaintiff for the 17 outstanding bills by payment in instalments, but the fact of the matter was that there was no concluded settlement between the parties (see para 21).

(2) It was well established that an agreement in writing could be contained in letters. The plaintiff had sent two emails to the defendant in which he proposed the terms of his engagement. The first email was sent on 12 September 2013. The plaintiff proposed briefing fees of RM45,000, to cover matters leading up to trial. From the first date of attendance at trial, the fees were to have been primarily determined by reference to time costs. The court had no doubt that, had the defendant at any time indicated that it did not agree to be billed on a time cost basis or that it would not be paying the outstanding invoices, the lead counsel would not have proceeded to continue to discharge further work in respect of the engagement. Taking into account the totality of the circumstances of the case, it was clear that the defendant agreed to be billed on a time cost basis. Furthermore, the circumstances were such that it would not lie in the mouth of the defendant to deny the practice of billing on a time cost basis, because the defendant had every opportunity to query, dispute or deny the liability for the bills on each occasion after the letters of

confirmation of fees were issued and before the relevant bill was issued but did not do so. The email from defendant on 20 September 2013 would be sufficient to connote an acceptance from the defendant as to the terms of engagement proposed by the plaintiff. In addition, the course of conduct adopted by the defendant throughout the engagement meant that it would be iniquitous to allow the defendant to deny that it had agreed to be billed on a time cost basis (see paras 25–26 & 31–34).

(3) The terms of the engagement of lead counsel of plaintiff did not expressly prohibit him from utilising the services of other lawyers in his firm to assist him in discharging his work as counsel for the defendant. In this court's judgment, in the absent of such a prohibition, it would have been open to him to obtain such assistance in any manner he saw fit, for as long as the amounts billed were not unreasonable. This would be a term implied by custom, for senior counsel could not be expected to attend to every work item that is required for the purposes of discharging his duties as counsel. In the present instance, two counsels were engaged to assist the lead counsel of plaintiff in discharging work for the engagement. Their billing rates were RM350 per hour, whereas plaintiff lead counsel's was RM1,200 an hour. It could thus be seen that the defendant accrued an advantage from this arrangement, as the billings would have been commensurately higher the senior counsel personally attended to all the work himself, in particular where the work in question did not require the specific expertise or experience of senior counsel. It can be seen from the foregoing that there was in fact no overlap in bill at all, since the arrangement had always been to defer the charges for work done on the submissions after trial. It was only when GST was about to be implemented that the plaintiff proceeded to bill for these works, in order to reduce the potential liability of the defendant to tax (see paras 37–45).

(4) The court concluded that the sums billed for attending to emails, correspondence and conferences were unreasonable. The charges for the work undertaken by the plaintiff were on a time cost basis, and hence whatever time spent on correspondence and discussions ought to be charged based on the actual time incurred. In bill dated 25 June 2014, for example, there was single entry relating to correspondence and email, which was the item incurred on 11 June 2014. It was not necessary for the court to explain each and every time entry relating to emails, correspondence and conferences; suffice to say that the court had examined all such time entries contained in the disputed bills and was not satisfied that any of the time incurred for the relevant time entries was unreasonable (see paras 47–52)

(5) Upon review of the time entries as a whole, the court concluded that the time incurred for attendance at trial and in undertaking work relating to the trial was not unreasonable. The defendant's failure to allege that any

particular time entry had been either incurred unreasonably or had resulted in fees of an unreasonable amount was fatal. In the circumstance of this case, it will not suffice for one party to simply make a general allegation that the total bill was unreasonable, without identifying the particular disputed time entries and articulating why the time incurred was unreasonable having regard to the complexity and volume of the work that was needed to be undertaken. In this case, although counsel for the defendant had identified the specific disputed time entries, she did not explain why she considered that the time incurred was excessive. Having elected not to do either of these things, it will not lie in the mouth of the defendant to then allege that the plaintiff had failed to prove that the time entries had been reasonably incurred by reason of its failure to adduce the relevant documents (see paras 63–66).

(6) It can clearly be seen that the instructions from the defendant was for the plaintiff to discontinue work only after completing the cross-examination of a witness for the defendants in that action. A series of correspondence thereafter ensued, which was marked by a rising level of acridity between the parties. With regards to charges for after trial submission, based on the instructions in the letter dated 26 November, the court was of the view that the letter clearly and unequivocally meant that the lead counsel was to complete the after trial submissions to incorporate all matters up to the evidence given on 14 November 2015. Not unreasonably, the lead counsel then proceeded on the basis of these instructions and billed for the time incurred, to which the court found to be a bill properly incurred (see paras 75–80).

(7) Even though the bills may not have contained the breakdown in the fees charges, such information could readily be obtained by referring to the accompanying fee ledger, which showed not only the actual time incurred but also the gross time costs before discount. A comparison between the total fees set out in the fee ledger and the billed amount would show the discount given to the defendant. There was sufficient information given by the plaintiff to the defendant for the defendant to check and, if thought necessary, to query the amount charged. The defendant had ample opportunity to query or dispute the bills at the time each of them were issued. They did not do so. The defendant could not now be permitted to complain on the lack of particularisation in the bills and to rely on this purported infirmity in the bills in order to escape from its liability for fees that were properly incurred (see paras 82–83).

(8) The court was of the view that the plaintiff could charge for the time that he had expended in travelling to and from court. Time cost was the agreed basis upon which the services of plaintiff would be charged, and it should not matter whether the counsel's time was expended in, say, preparing submissions or travelling to and from court. The court had

examined the time entries in the respective fee ledgers and was of the view that the time incurred was representative of how long it would have taken to travel to the Seremban Court Complex from Kuala Lumpur. The fees thus incurred were accordingly not unreasonable. The counsel would have been entitled to charge for travelling time, for as long as the time spent travelling would not have been incurred but for his engagement by the client. Thus, he would not have been entitled to charge for his daily commute to plaintiff's office from home, for that would be time that would have been expended in any event, and regardless of the engagement by the defendant. The travelling time incurred in the present instance, however, were incurred as a result of the engagement of the counsel by the defendant and would not have been incurred but for this engagement (see paras 85–86).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan timbalan pendaftar untuk tuntutan bil peguamcara melalui saman pemula untuk servis perundangan yang telah diberikan oleh plaintif. Defendan telah melantik rakan kongsi senior di firma plaintif untuk mewakili defendan untuk kes terhadap kerajaan Negeri Sembilan untuk satu kontrak projek bekalan air. Plaintif telah mengisukan bil-bil terhadap defendan di atas servis peguam senior firma plaintif. 12 bil telah dibayar oleh defendan yang berjumlah RM300,000. Tujuh belas bil lain yang berjumlah RM733,096.22 masih tertunggak dan belum dibayar oleh defendan. Pihak-pihak cuba untuk menyelesaikan perkara ini. Walaupun pihak-pihak bersetuju untuk menyelesaikan perkara ini dengan bayaran RM500,000, defendan tidak bersetuju untuk satu akibat undang-undang sekiranya defendan gagal menyelesaikan jumlah penyelesaian ini, dan hanya bersetuju untuk membayar RM500,000 tanpa sebarang terma penyelesaian. Oleh yang demikian, plaintif telah memfailkan saman pemula ini untuk langkah taksiran bil untuk kesemua 17 bil tersebut menurut A 59 kk 16 dan 17 Kaedah-Kaedah Mahkamah 2012 dan s 126(3) Akta Profesion Undang-Undang 1976, yang mana bil-bil ditaksirkan oleh timbalan pendaftar. Pada 1 Mac 2019, timbalan pendaftar telah memutuskan bahawa kesemua bil tertunggak tersebut harus dibayar oleh defendan terhadap plaintif. Timbalan pendaftar memutuskan, inter alia, defendan telah menyatakan bahawa defendan boleh membayar jumlah tertunggak tersebut secara ansuran, dan defendan cuba mengelakkan obligasi untuk membayar bil-bil tertunggak tersebut dan menyatakan bahawa terdapat bil yang bercanggah. Isu-isu rayuan ini adalah: (a) sama ada terdapat perjanjian bertulis antara pihak-pihak untuk bil berdasarkan kos masa dan berdasarkan polisi firma plaintif; (b) sama ada masa yang digunakan oleh peguam lain boleh dibilkan; (c) sama ada terdapat percanggahan bil mengenai perkara di dalam bil; (d) sama ada caj untuk emel, surat-menyurat dan mesyuarat adalah berlebihan dan tidak patut dicaj; (e) sama ada caj untuk dua permohonan interlokutori adalah berlebihan dan tidak berpatutan; (f) sama ada caj untuk caj persedian perbicaraan, kehadiran

ke mahkamah dan hujahan selepas perbicaraan adalah berlebihan; (g) sama ada bil-bil telah diperincikan; dan (h) sama ada caj perjalanan tidak tertakluk di bawah masa perjalanan oleh peguam senior berdasarkan caj kos masa.

Diputuskan, menolak rayuan dengan kos terhadap defendan:

(1) Mahkamah ini berpendapat bahawa alasan timbalan pendaftar bahawa hujahan defendan tiada merit adalah salah. Fakta bahawa defendan telah membayar 12 bil sebelumnya tidak bermaksud perkara di dalam 17 bil lain tidak mempunyai perkara yang tidak boleh dipersoalkan. Defendan juga telah bersedia untuk menyelesaikan 17 bil yang lain secara ansuran, namun fakta yang perlu diperhatikan ialah tidak terdapat sebarang perjanjian penyelesaian muktamad antara pihak-pihak (lihat perenggan 21).

(2) Adalah menjadi undang-undang mantap bahawa perjanjian secara bertulis boleh ditentukan melalui surat-menyurat. Plaintif telah menghantar dua emel kepada defendan di mana plaintif mencadangkan terma-terma servis. Emel pertama dihantar pada 12 September 2013. Plaintif mencadangkan fi guaman sebanyak RM45,000, untuk menampung urusan yang membawa kepada perbicaraan. Dari tarikh pertama kehadiran pada perbicaraan, fi akan ditentukan berdasarkan kos masa. Mahkamah mendapati bahawa, defendan mempunyai hak untuk tidak bersetuju untuk dibilkan atas dasar kos masa atau tidak akan membayar invois yang tertunggak, dan peguam senior tersebut tidak akan meneruskan kerja selanjutnya. Dengan mengambil kira jumlah keadaan itu, jelas bahawa defendan bersetuju untuk dibilkan berdasarkan kos masa. Tambahan pula, defendan mempunyai setiap peluang untuk pertanyaan, mempertikaikan atau menafikan liabiliti untuk bil pada setiap kali selepas surat pemakluman fi guaman dikeluarkan namun defendan tidak berbuat demikian. Emel daripada defendan pada 20 September 2013 telah jelas membuktikan penerimaan daripada defendan mengenai terma-terma servis plaintif yang dicadangkan. Di samping itu, perlakuan defendan sepanjang servis plaintif menunjukkan defendan bersetuju untuk dibilkan mengikut kos masa (lihat perenggan 25–26 & 31–34).

(3) Terma perlantik peguam senior plaintif tidak secara nyata melarang beliau daripada menggunakan khidmat peguam lain di firmanya untuk membantunya dalam membantu tugasnya sebagai peguam bagi defendan. Dalam penghakiman mahkamah ini, adalah terbuka kepadanya untuk mendapatkan bantuan sedemikian dalam apa jua cara yang dilihatnya patut, selagi jumlah yang dibilkan adalah munasabah. Peguam senior tidak boleh menghadiri setiap kerja yang diperlukan untuk tujuan melaksanakan tugasnya sebagai peguam. Di dalam kes ini, dua peguam telah terlibat untuk membantu peguam senior plaintif

dalam menjalankan kerja-kerjanya dalam mewakili defendan. Kadar bil mereka adalah RM350 sejam, manakala peguam kanan plaintif ialah RM1,200 sejam. Oleh itu, bil-bil adalah sepadan dengan bil peguam kanan kerana menghadiri semua kerja itu sendiri, walaupun terdapat kerja yang tidak memerlukan kepakaran atau pengalaman khusus peguam senior. Tiada percanggahan bil sama sekali, kerana kerja yang dilakukan adalah selepas perbicaraan. Hanya apabila GST akan dilaksanakan plaintif membilkan kerja-kerja ini, untuk mengurangkan liabiliti defendan kepada cukai GST tersebut (lihat perenggan 37–45).

(4) Mahkamah membuat kesimpulan bahawa bil menghadiri emel, surat-menyurat dan persidangan adalah tidak munasabah. Caj untuk kerja yang dijalankan oleh plaintif adalah berdasarkan kos masa, dan oleh itu apa sahaja masa yang dihabiskan untuk surat-menyurat dan perbincangan sepatutnya dikenakan berdasarkan masa sebenar yang ditanggung. Dalam bil bertarikh 25 Jun 2014, sebagai contoh, terdapat satu entri yang berkaitan dengan surat-menyurat dan emel, yang merupakan kerja yang dibuat pada 11 Jun 2014. Adalah bukan tugas mahkamah untuk menerangkan setiap kemasukan berkaitan emel, surat-menyurat dan persidangan; memadai untuk mahkamah memeriksa semua penyertaan masa yang terkandung dalam bil-bil yang dipertikaikan dan mendapati bahawa mana-mana masa pada entri masa yang berkaitan adalah tidak munasabah (lihat perenggan 47–52).

(5) Setelah meneliti entri masa secara keseluruhan, mahkamah menyimpulkan bahawa masa untuk kehadiran pada perbicaraan dan dalam menjalankan kerja-kerja yang berkaitan dengan perbicaraan itu adalah tidak munasabah. Kegagalan defendan untuk mendakwa bahawa entri masa tertentu telah sama ada ditanggung secara tidak munasabah atau telah menyebabkan jumlah fi yang tidak munasabah adalah fatal. Dalam keadaan kes ini, tidak mencukupi untuk satu pihak sahaja untuk hanya membuat tuduhan bahawa jumlah bil adalah tidak munasabah, tanpa mengenal pasti entri berkaitan dan menyoal kos masa adalah tidak munasabah dengan mengambil kira kerumitan dan jumlah kerja yang diperlukan. Dalam kes ini, walaupun peguam untuk defendan telah mengenal pasti entri masa tertentu, defendan tidak menjelaskan mengapa dia menganggap bahawa kos masa tersebut adalah berlebihan. (lihat perenggan 63–66).

(6) Jelasnya, arahan daripada defendan adalah untuk plaintif menghentikan kerjanya hanya selepas selesai pemeriksaan balas terhadap seseorang saksi bagi defendan dalam tindakan itu. Beberapa siri surat-menyurat selepas itu telah menunjukkan sedemikian. Berdasarkan arahan dalam surat bertarikh 26 November, mahkamah berpendapat bahawa surat itu dengan jelas mengarahkan peguam senior untuk melengkapkan hujahan selepas perbicaraan sehingga 14 November 2015. Perkara ini adalah

munasabah di mana, peguam senior kemudiannya membilkannya menurut kos masa, yang mana mahkamah mendapati bil tersebut telah dibilkan secara munasabah (lihat perenggan 75–80).

(7) Walaupun bil-bil mungkin tidak mengandungi perincian dalam caj yuran, maklumat tersebut boleh diperolehi dengan merujuk kepada lejar, yang menunjukkan bukan sahaja masa sebenar yang dibilkan, malah kos masa kasar sebelum diskaun. Perbandingan antara jumlah yuran yang dinyatakan dalam lejar fi guaman dan jumlah yang dibilkan akan menunjukkan diskaun yang diberikan kepada defendan. Terdapat maklumat yang mencukupi yang diberikan oleh plaintif kepada defendan untuk defendan menyemak dan, jika difikirkan perlu, untuk bertanya jumlah yang dikenakan. Defendan mempunyai peluang yang mencukupi untuk pertanyaan atau mempertikaikan bil-bil pada masa masing-masing dikeluarkan. Mereka tidak berbuat demikian. Defendan kini tidak boleh dibenarkan untuk menyoal bil-bil melepaskan diri dari liabilitinya untuk fi guaman yang dicaj secara betul (lihat perenggan 82–83).

(8) Mahkamah ini berpendapat bahawa plaintif boleh mengenakan bayaran untuk masa perjalanan ke mahkamah. Kos masa adalah asas yang dipersetujui di mana perkhidmatan plaintif akan dikenakan, untuk perjalanan ke mahkamah. Mahkamah ini telah memeriksa entri masa di lejar fi guaman, dan berpendapat bahawa masa yang digunakan menunjukkan tempoh masa perjalanan ke Kompleks Mahkamah Seremban dari Kuala Lumpur. Oleh itu, caj perjalanan tersebut adalah munasabah. Peguam berhak untuk mengenakan bayaran untuk masa perjalanan, melainkan masa peribadi peguam. Oleh itu, peguam, tidak berhak untuk mengenakan bayaran untuk berulang-alik hariannya ke pejabat plaintif dari rumah, kerana ianya adalah masa yang tidak melibatkan defendan. Kos yang dicaj berdasarkan perjalanan ini dipersetujui berdasarkan perlantikan peguam senior plaintif (lihat perenggan 85–86).]

Cases referred to

AMM Murugappa Chettiar v S Seenivasagam & Others [1940] 1 MLJ 108 (distd)
Chamberlain v Boodle & King (a firm) [1982] 3 All ER 188, CA (refd)
Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)

Legislation referred to

Legal Profession Act 1976 ss 116, 126(3)
Petroleum Development Act 1974
Rules of Court 2012 O 41 r 5(1), O 59 rr 16, 17, 17(3)

Vijay Raj (Raja Nadhil Aqran with him) (Skrine) for the plaintiff.
Dhyana Shila a/p Vasanthan (Dhyan & Co) for the defendant.

Azizul Azmi Adnan J:

INTRODUCTION

[1] This case involved the taxing of a solicitor's bills to its own client.

[2] The plaintiff in this case, Messrs Skrine, is a law firm. It commenced this originating summons to tax bills that it had rendered to the defendant, NS Water Consortium Sdn Bhd.

[3] The defendant had appointed En Mubashir Mansor, a senior partner of the plaintiff to act as lead counsel to act for it in connection with a suit that it had instituted against (among others) the state of Negeri Sembilan for breach of a contended water supply concession.

[4] Skrine issued bills to the defendant in connection with En Mubashir's engagement as lead counsel. 12 of these bills were paid by the defendant, the aggregate sum of which was almost RM300,000. There were 17 further bills that were issued by Skrine which remained unpaid. The sum of these 17 outstanding bills was RM733,096.22.

[5] The parties attempted to come to a settlement for the outstanding bills. Although both parties were willing to settle on a payment of RM500,000 by the defendant to Skrine, they could not agree on the legal consequence should the defendant default on this settlement. Skrine, not unreasonably, wanted to claim for the whole amount of the outstanding bills in the event of breach by the defendant of the settlement terms. The defendant, on the other hand, was only ever willing to pay RM500,000, regardless of whether it adhered to the settlement terms.

[6] Because they could not agree on the settlement terms, Skrine commenced this originating summons.

[7] On 17 June 2018, the High Court determined, inter alia, that the taxation exercise would be conducted in respect of the 17 outstanding bills, that these bills were to be taxed on a solicitor-client basis in accordance with O 59 rr 16 and 17 of the Rules of Court and s 126(3) of the Legal Profession Act 1976, and that the bills were to be taxed by the deputy registrar of the court.

[8] On 1 March 2019, the deputy registrar determined that the whole amount of the outstanding bills was due and payable to Skrine. The learned

deputy registrar found, inter alia, that the defendant had represented to Skrine that it would pay the amounts in the outstanding bills on an instalment basis, and that the defendant was merely attempting to evade its legal obligation by claiming that some of items in the bills were unreasonable and that there were overlapping items on the bills. The grounds of judgment of the deputy registrar did not, however, address the specific allegations of the defendant.

[9] The defendant appealed to me against the decision of the deputy registrar.

The grounds of the appeal

[10] The defendant advanced a raft of reasons as to why the learned deputy registrar erred and why the outstanding bills ought not be allowed. I summarise these grounds in the following manner:

(a) it was contended that there was no agreement in writing that had been entered into between Skrine and the defendant by which the defendant had agreed to pay legal fees on a time cost basis and in accordance with the billing policies of Skrine;

(b) it was contended that the bills included the time costs incurred for lawyers other than En Mubashir. According to the defendant, it had only appointed En Mubashir as lead counsel, whereas there was work described in the bills as having been discharged by other lawyers in Skrine amounting to approximately RM180,000. The defendant denied liability for the work discharged by these other lawyers;

(c) it was contended that there were overlaps in the items specified in the bills. These overlaps could be described as follows:

(i) different outstanding bills covered work done over the same period. The defendant claimed that it was not liable for RM177,900 out of the total amount payable; and

(ii) some of the outstanding bills covered work done in respect of a period for which a prior bill had already been issued to and paid by the defendant. Here, the defendant claimed RM71,600 had already been paid and ought no longer remain payable;

(d) it was contended that charges for emails, correspondence and conferences were excessive and ought not be allowed. The defendant disputed RM60,500 that had been charged, and contended that RM2,000 ought instead be allowed as a reasonable sum for the work discharged;

(e) it was contended that the charges for two interlocutory applications were unreasonable and excessive. These two interlocutory applications

were an application to stay a notice to produce, and an application to disqualify Tan Sri Shafee Abdullah from representing the defendants in the writ action against the state of Negeri Sembilan. The sum in dispute here was RM74,200. Counsel for the defendant submitted that RM5,000 was a reasonable amount;

(f) the plaintiff charged RM252,625 as fees for work done in preparation for trial and for attendance at trial. The defendant contended that this amount was grossly excessive. The defendant proposed a sum of RM36,000 for attendance at trial, as it contended that the bills that have already been paid had covered the charges incurred in preparation for trial;

(g) it was advanced for the defendant that the costs claimed for after trial submissions were excessive, and that RM159,339.55 ought to be deducted from the bill payable because this particular bill was issued after En Mubashir's appointment was terminated. The outstanding bills contained a sum of RM883,750 that was said to be attributable to submissions after trial (before taking into account the discount that was given by the plaintiff). The defendant proposed RM15,000 as a reasonable amount for the works done in connection with this part of work undertaken by the plaintiff;

(h) it was contended that Skrine had not provided an adequate breakdown of the fees incurred, and that in the absence of a detailed bill of costs, the taxation exercise ought not be carried out; and

(i) it was contended that Skrine was not entitled to charge for the travelling time incurred by En Mubashir on a time cost basis. The sum in dispute under this head was RM23,575.

[11] Each of these grounds of appeal is considered in turn at para 23, et seq, post. Before embarking on the analysis of merits of the appeal, it will be useful to first remind ourselves of the applicable principles where taxation is to be carried out in a solicitor-client basis.

THE APPLICABLE PRINCIPLES

[12] As mentioned earlier, on 11 July 2018 the court had previously ordered that the outstanding bills be taxed pursuant to O 59 rr 16 and 17 of the Rules of Court and s 126(3) of the Legal Profession Act 1976.

[13] Section 126(3) provides as follows:

> (3) In any case where an advocate and solicitor and his client consent to taxation of a solicitor's bill the Registrar may proceed to tax the bill notwithstanding that there is no order therefor.

[14] The Legal Profession Act 1976 expressly provides that the taxation of bills of costs is to be governed by the Rules of Court 2012:

> 132 Bill of costs to follow Rules of court
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> Bills of costs for taxation as between advocate and solicitor and client shall be drawn in the manner provided by the Rules of the High Court, and the taxation shall be governed by the Rules.

[15] Order 59 r 17 of the Rules of Court 2012, in so far as it is material to the facts of the present case, provides as follows:

> 17 Costs payable to a solicitor by his own client (O 59 r 17)
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> (1) This Rule is in amplification and not in derogation of the procedure set out in the Legal Profession Act 1976.
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> (2) On the determination of a solicitor's bill to his own client (except a bill with respect to non-contentious business and a bill payable pursuant s 5 of the Legal Aid Act 1971), all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.
>
> (3) For the purpose of paragraph (1), all costs incurred with the express or implied approval of the client shall be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.

[16] Accordingly, in order for the defendant to succeed in resisting an item of costs, the defendant would need to satisfy the court that the item in question has been unreasonably incurred, or that the amount billed for that item was unreasonable.

[17] Furthermore, where the item or the amount billed in respect of them in question was approved by the client, whether expressly or impliedly, a legal presumption will arise that the item was reasonably incurred and that the amount billed for the item was reasonable, as the case may be. In my view, this legal presumption is irrebuttable. This is because of the word 'conclusively' appearing in sub-r (3).

[18] Once a determination of costs has been made, a court sitting in appeal would be slow to interfere with the determination of costs by the court below. In *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25, the plaintiff respondent was an account holder in Bank Bumiputra, who sought a declaration that the acquisition by Petronas of the shares in Bank Bumiputra was ultra vires the Petroleum Development Act 1974. Petronas applied to strike out the action. Before the application could be heard, the Petroleum Development Act 1974 was amended with retrospective effect, giving Petronas the necessary powers. The judge at first instance struck out the

action but awarded costs in favour of Cheah. Petronas appealed against the order of costs. The Supreme Court dismissed the appeal, holding:

> [A]n appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

[19] That case involved costs awarded against the opposing party in the action. In my judgment, the same principles apply where costs are sought to be taxed as between a solicitor and its client, in as far as the scope of appellate intervention is concerned.

[20] As alluded to earlier, no findings were made by the deputy registrar regarding the specific contentions by the defendant that specific amounts in the bills rendered were unreasonable and that some of the items contained in the bills were unreasonably incurred. The deputy registrar appeared to have proceeded on the basis that the contentions of the defendant were without merit because:

(a) the defendant had not disputed any of the 12 bills that had been paid, which bills were rendered on the same time cost basis as the 17 outstanding bills; and

(b) the parties had negotiated a settlement of the outstanding bills that involved payment on an instalment basis but could not come to an agreement on the default clause.

[21] I am of the view that the logic behind this reasoning was erroneous. The fact that the defendant had paid the 12 earlier bills does not mean that none of the items in the subsequent 17 bills were tainted with unreasonableness. Similarly, the defendant may have been prepared to come to a settlement with the plaintiff for the 17 outstanding bills by payment in instalments, but the fact of the matter was that there was no concluded settlement between the parties. Furthermore, the fact that the defendant was willing to settle at RM500,000 did not mean that none of the outstanding items (amounting to RM733,096.22) were unreasonably incurred or constituted an unreasonable amount.

[22] For this reason, I considered it necessary for each of the specific allegations of the defendant to be analysed and determined on its merits. In the absence of any analysis by the deputy registrar at first instance on the specific allegations, the discretion of this court now comes into effect in order to determine the defendant's complaints. In the following paragraphs, I address the specific complaints of the defendant in turn.

A WAS THERE AN AGREEMENT IN WRITING BETWEEN THE PARTIES?

[23] It was advanced for the defendant that it had not agreed to be billed on a time cost basis. It was also contended that there was no agreement in writing B that had been entered into between Skrine and the defendant. This, according to counsel for the defendant, was contrary to s 116 of the Legal Profession Act 1976, which requires agreements between a solicitor and his or her client to be in writing and 'signed by the client'.

C

[24] Section 116 provides as follows:

> 116 Advocate and solicitor may enter agreement for costing contentious business
>
> (1) Subject to any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole D or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to this E Part.

[25] Skrine's position was that the agreement between it and the defendant with respect to the terms of the appointment of En Mubashir was constituted F by emails that had passed between them. It is well established that an agreement in writing can be contained in letters: see *Chamberlain v Boodle & King (a firm)* [1982] 3 All ER 188 per Denning MR.

[26] In the present case, En Mubashir had sent two emails to the defendant G in which he proposed the terms of his engagement. The first email was sent on 12 September 2013. En Mubashir proposed briefing fees of RM45,000, to cover matters leading up to trial. From the first date of attendance at trial, the fees were to have been primarily determined by reference to time costs. The relevant portions of the email are reproduced below:

H

> (a) I think that in the circumstances of the case, it would be quite in order to propose for briefing fees of RM45,000.00. This will cover the fees for preparing the trial including perusal of the pleadings, the notes of evidence thus far and the documents;
>
> I (b) The said RM45,000.00 shall not cover the fees to be incurred from and inclusive of the first court attendance until the delivery of judgment by the High Court. It is difficult to accurately estimate the fees to be incurred for this period simply because I cannot be certain of the exact scope of works that shall be expected of me as counsel as the matter unfolds, apart from attending court to conduct the trial. For instance, there may well be

> complications which would necessitate urgent attention to be given and particular issues of law to be looked into greater details. Thus, any stipulations of fixed fees is bound to be arbitrary and may work an injustice to you. In the light of that, I respecfully, propose that the fees to be incurred for this period shall be determined from tme to time in accordance with the normal billing policy of Skrine. What that means is that the fees are discretionary and depending on the circumstances of the case as a whole and are primarily determined on the basis of time costs. What I usually do, in order to make the fees as least painful to clients as possible, so to speak, is to issue interim bills from time to time whenever reasonably substantial services have been rendered for the particular period of time. I will then look at the total amount of time costs incurred for that period and use my discretion to grant whatever discount of fees that I shall deem appropriate. I will then propose to you the fees that I intend to charge for the particular period of time for your agreement. You shall then be able to see whether the proposed fees you are billed for the actual services rendered after taking into account whatever discount, if any, that is given, rather than on the arbitrary and conjectural basis of fixed fees. I should say also that, in accordance with Skrine's policy, my time costs are at the moment RM1,200.00 per hour but please do not be alarmed by that as I am hoping that the manner of billing you as stated above would enable you to determine whether the bills to be issued are fair and reasonable;

[27] En Mubashir sent the second email on 19 September 2013. In this email, he referred to a meeting that he had with a representative of the defendant, and agreed to reduce the briefing fees to RM35,000. The following day, Dato' Rahiman Dawood indicated his agreement in an email to En Mubashir, wherein he stated:

> Tq en mubashir for your kind consideration, I will make settlement by Monday and please advise to whom I should address the cheque. At the moment I'm still mourning the death of my partner Dato Azhar Hashim. wasalam
>
> Dato' Dr Rahiman Dawood

[28] Throughout the engagement, interim bills were issued to the defendant. Skrine's procedure for billing were as follows.

[29] A letter of confirmation of fees would be issued to the defendant before a bill was issued. In this letter, the total time costs incurred would be set out for the relevant billing period, together with the proposed fees, after applying a discount (which according to the terms of engagement was discretionary on Skrine's part). The defendant was also given time to make further queries on the proposed fees before a final bill was issued.

[30] It was not in dispute that the defendant proceeded with the engagement of En Mubashir on this basis. Not only did the defendant pay the 12 bills but it had also never raised any query (much less objection) on the bills until after En Mubashir's engagement was terminated.

[31] In the course of the engagement, there were times when some of the bills became overdue. The contemporaneous documentary evidence (exhibited at MBM36 and MBM37) showed that repeated assurances were given to Skrine by a representative of the defendant, Ms Choo, that the payments would be attended to. There is no doubt in my mind that, had the defendant at any time indicated that it did not agree to be billed on a time cost basis or that it would not be paying the outstanding invoices, En Mubashir would not have proceeded to continue to discharge further work in respect of the engagement.

[32] The affidavit in opposition affirmed on behalf of the defendant was deposed by one Syahin bin Jalal Ahmad, a director of the defendant. He did not deny the existence of the email correspondence in which those representations were contained (see para 19 of Syahin's affidavit dated 21 August 2017).

[33] Syahin's affidavit denied that the defendant had not objected to the letters of confirmation of fees and bills that were issued prior to the termination of En Mubashir's appointment as lead counsel. However, no documentary evidence was tendered to establish that the defendant had done so. Even though Syahin may have been a director of the defendant, he was not personally acquainted with the facts of the case, as none of the correspondence were addressed to or emanated from him. I accept that, as a director of the defendant, he will be in possession of the documents and records of the defendant, and to this extent he would be competent to depose as to their existence and contents. Hence, if there had been queries or objections raised, Syahin would have only been competent to depose as to their existence and contents if those queries and objections existed in the records of the defendant. If he failed to explain the basis of his knowledge, then the averments in his affidavit ought not be taken into account by reason of O 41 r 5(1) of the Rules of Court 2012.

[34] In my judgment, taking into account the totality of the circumstances of the case, it was clear that the defendant agreed to be billed on a time cost basis. Furthermore, the circumstances were such that it would not lie in the mouth of the defendant to deny the practice of billing on a time cost basis, because the defendant had every opportunity to query, dispute or deny the liability for the bills on each occasion after the letters of confirmation of fees were issued and before the relevant bill was issued but did not do so. The email from Dato' Dr Rahiman on 20 September 2013 would be sufficient to connote an acceptance from the defendant as to the terms of engagement proposed by

En Mubashir. In addition, the course of conduct adopted by the defendant throughout the engagement meant that it would be iniquitous to allow the defendant to deny that it had agreed to be billed on a time cost basis.

[35] This finding alone did not dispose of the entire dispute between the parties. In the following paras, I consider the other allegations of the defendant.

TIME INCURRED BY OTHER LAWYERS

[36] It was contended by the defendant that the bills included the time costs incurred for lawyers other than En Mubashir. According to the defendant, it had only appointed En Mubashir as lead counsel, whereas there was work described in the bills as having been discharged by other lawyers in Skrine amounting to approximately RM180,000. The defendant denied liability for the work discharged by these other lawyers.

[37] The first observation that may be made is that the terms of the engagement of En Mubashir did not expressly prohibit him from utilising the services of other lawyers in his firm to assist him in discharging his work as counsel for the defendant. In my judgment, absent such a prohibition, it would have been open to En Mubashir to obtain such assistance in any manner he saw fit, for as long as the amounts billed were not unreasonable. This, in my view, would be a term implied by custom, for senior counsel could not be expected to attend to every work item that is required for the purposes of discharging his duties as counsel. In the present instance, Mr Witter Yee and Mr Damian Kiethan assisted En Mubashir in discharging work for the engagement. Their billing rates were RM350 per hour, whereas En Mubashir's was RM1,200 an hour. It could thus be seen that the defendant accrued an advantage from this arrangement, as the billings would have been commensurately higher had En Mubashir personally attended to all the work himself, in particular where the work in question did not require the specific expertise or experience of senior counsel.

[38] The defendant also had ample opportunity to object to the time incurred by these other lawyers, but only chose to dispute the amounts after the engagement had ended. For instance, in respect of the bill issued on 25 June 2014, the fee ledger would have been given to the defendant prior to the bill being issued. It would have been clear that Mr Yee had been discharging work on the file, from the information set out in the fee ledger. Mr Yee had spent 40 hours on the file, incurring some RM14,000 in time costs. Even though the actual time costs incurred for the period billed was RM30,500, the defendant was only billed for RM18,000, due to the generous discounting policy applied by Skrine. Now, had the defendant possessed a genuine grouse by the fact that junior lawyers were working on the engagement, it could have raised an

objection even before the bill of 25 June 2014 was issued. Instead, it did nothing. In such circumstances, Skrine would have been entitled to proceed on the basis that the defendant did not have any issue with junior lawyers assisting senior counsel on the engagement. The conduct of Skrine in this regard would not have been any different from any other large law firm in the country.

[39] Learned counsel for the defendant cited the case of *AMM Murugappa Chettiar v S Seenivasagam & Others* [1940] 1 MLJ 108 in support of her arguments. I have examined that case carefully, and am not able to discern its relevance to the case that was before me. The plaintiff in that case complained, among others, that charges for two counsel were billed to him and that included in the bill was subsistence allowance for the five days' of hearing. The court found that the charges for two lawyers had in fact been properly incurred. The charges for subsistence allowance was disallowed, which has no relevance to the issues presently under consideration.

OVERLAPPING ITEMS IN THE BILLS

[40] It was contended that there were overlaps in the items specified in the bills. These contended overlaps were as follows:

(a) the unpaid Bill No 777021, amounting to RM177,900, were in respect of work done during a period that had already been billed in three previous outstanding bills. The defendant thus claimed that it was not liable for the overlapping items in Bill No 777021; and

(b) similarly, the items in Bill No 777021 covered work done in respect of a period for which a prior bill had already been issued to and paid by the defendant. Here, the defendant claimed RM71,600 had already been paid and ought no longer remain payable.

[41] The work billed in Bill No 777021 were performed over a 11 month period, from 31 March 2014 to 1 March 2015. There were, however, three previous bills in respect of the period 1 July 2014 to 31 January 2015. In addition, there were bills that had already been settled by the defendant that covered work discharged in the same period as that covered by bill No 777021. Because of these overlaps, learned counsel for the defendant contended that:

> ... the Plaintiff ought not be entitled to *rebill for the same period* by merely changing the description of the work done and claiming fees twice for the same period. (Original emphasis.)

[42] A detailed examination of Bill No 777021 will reveal that all the work that had been carried out and billed under this bill related to the after trial submission. In the letters of confirmation that were previously issued to the

defendant, the defendant was in fact informed that the work for the submissions after trial had already commenced, but that the billing for this work would be deferred. These letters contained the following explanation:

> There were services rendered during the aforesaid period of billing in respect of drafting submission after trial by Mr Mubashir bin Mansor. This is still ongoing. The billing for these services shall be deferred until the submission is completed or, when reasonably substantial services shall have been rendered prior to its completion in which case, the services shall be billed from time to time accordingly.

[43] The defendant was informed no less than six times of this arrangement in respect of the outstanding billings for the submissions after trial.

[44] On 11 March 2015, Skrine issued a letter of confirmation of fees for the works undertaken in respect of the submissions after trial. It explained that, because of the impending implementation of goods and services tax on 1 April 2015, it would be billing for all prior work that had been incurred but not yet billed. Such an arrangement would have been advantageous to the defendant, as otherwise it would have been liable for GST had the bill been issued after the implementation of GST. This letter explained the proposed billing in the following terms:

> These were services rendered in respect of drafting submission after trial by Mr Mubashir bin Mansor. This is still ongoing until completion of the trial. However, in view of the GST coming into force with effect from 1.4.2015, we intend to issue our invoice on or before 31.3.2015 for all works carried out before 1.4.2015

[45] It can be seen from the foregoing that there was in fact no overlap in Bill No 777021 at all, since the arrangement had always been to defer the charges for work done on the submissions after trial. It was only when GST was about to be implemented that Skrine proceeded to bill for these work, in order to reduce the potential liability of the defendant to tax. I was therefore unable to conclude that the work billed in Bill No 777021 were unreasonably incurred, or were for an unreasonable amount.

CHARGES FOR EMAILS, CORRESPONDENCE AND CONFERENCES

[46] It was contended that charges for emails, correspondence and conferences were excessive and ought not be allowed. The defendant disputed RM60,500 that had been charged, and contended that RM2,000 ought instead be allowed as a reasonable sum for the work discharged.

[47] Having examined the bills and the fee ledgers, I was unable to conclude that the sums billed for attending to emails, correspondence and conferences

were unreasonable. The charges for the work undertaken by Skrine were on a time cost basis, and hence whatever time spent on correspondence and discussions ought to be charged based on the actual time incurred. In Bill No 769457 dated 25 June 2014, for example, there was single entry relating to correspondence and email, which was the item incurred on 11 June 2014. It was described in the bill in the following manner:

> 11/06/14 Correspondence — email to Terrance to confirm his instructions

[48] Now, if the fee ledger relating to Bill No 769457 is examined, a corresponding entry may be found for the same date. The fee ledger records that En Mubashir had spent 20 minutes in writing this email, which presumably included time spent reading and comprehending the instructions from the solicitor (Terrance was the instructing solicitor in the matter), as well as composing and writing the email response to the instructing solicitor. Twenty minutes of En Mubashir's time translated to RM400 at his billing rate of RM1,200 an hour. Of course, even though the actual time spent for the period covered by the fee ledger amounted to RM30,500, a substantial discount was applied to the final bill, such that the amount actually billed (before tax and disbursements) was only RM18,000. Now, if the discount (which amounted to slightly over 40%) was applied to the time costs incurred by En Mubashir in attending to the email to Terrance, the actual time costs that was billed amounted to about only RM236.

[49] This cannot by any stretch of the imagination be said to be unreasonable.

[50] To take another example, in Bill No 772569, the following narratives appear for two time entries set out in the bill:

18/08/14	Conference meeting with MBM, Dato' Rahiman, Terrance and Dino to draft Dino's affidavit in support
18/08/14	Conference meeting Terrance, Dato' Rahiman, Dino and DK — interviewing and obtaining instructions on facts from Dino for the purposes of his affidavit in reply to Shafee's affidavit

[51] Upon first impressions, it would appear that these two entries relate to the same conference. An examination of the corresponding fee ledger will reveal why there were two similar entries: the first item related to a time entry by Mr Damian Kiethan (described as DK in the second time entry), while the second time entry was by En Mubashir. Mr Kiethan spent 180 minutes, while En Mubashir spent 130 minutes, suggesting that the meeting continued without Mr Mubashir at some point. Considering the nature of the time entry, I was unable to conclude that the time incurred was unreasonable. In my view,

it would not be unusual for there to be a meeting of two to three hours in order to interview a deponent of a proposed affidavit.

[52] I do not consider it necessary for me to explain each and every time entry relating to emails, correspondence and conferences; suffice to say that I have examined all such time entries contained in the disputed bills and was not satisfied that any of the time incurred for the relevant time entries was unreasonable.

CHARGES FOR INTERLOCUTORY APPLICATIONS

[53] It was contended that the charges for two interlocutory applications were unreasonable and excessive. These two interlocutory applications were an application to stay a notice to produce, and an application to disqualify Tan Sri Shafee Abdullah from representing the defendants in the writ action against the state of Negeri Sembilan. The disputed charges were set out in Bill No 766230 dated 6 March 2014, Bill No 767596 dated 22 April 2014 and Bill No 767931 dated 30 April 2014. The sum in dispute was RM74,200. Counsel for the defendant submitted that RM5,000 was a reasonable amount.

[54] In her submissions, counsel for the defendant argued that:

> ... it must be borne in mind that it is an interlocutory application where the law is settled in the issue of disqualifying of solicitors and primary [sic] based on facts of each case. Further, the Defendant too had to pay the solicitors on record who draft all affidavit and Mr Krishna, the co-counsel for works done in respect of this application.

[55] The short — but complete — answer to the arguments of counsel for the defendant was that none of the three disputed bills were the subject of the taxing exercise. These three bills were part of the 12 bills that had already been paid by the defendant. When the matter came before the court, the learned judicial commissioner then hearing the matter made the following order on 11 July 2018 pursuant to an oral application made on behalf of the defendant:

> Penetapan kos tersebut adalah bagi 17 bil kos Plaintif seperti yang dinyatakan dalam Lampiran A kepada Saman Pemula manakala 12 bil kos Plaintif yang lain yang telah dibayar sepenuhnya tidak termasuk dalam proses penetapan kos di sini.

[56] For this simple reason, this ground of appeal failed. If the defendant wished to dispute the bills already paid, then the proper course ought to have been an appeal against the court order of 11 July 2018.

A CHARGES FOR PREPARING FOR AND ATTENDANCE AT TRIAL

[57] The plaintiff charged RM252,625 as fees for work done in preparation for trial and for attendance at trial. The defendant contended that this amount was grossly excessive. The defendant proposed a sum of RM36,000 for attendance at trial, as it contended that the briefing fee of RM35,000 and the bills that have been paid had already covered the charges incurred in preparation for trial. It was further argued that Skrine had not provided the breakdown fees for the items that remained unpaid on the outstanding bills.

[58] The first point to be made was that the issue of the briefing fee of RM35,000 was not germane to the issue at hand. According to the terms of the engagement, the briefing fee did not cover for time costs incurred from the first date of court attendance by En Mubashir. In effect, the briefing fee was a fixed cost for reviewing the cause papers, the documents adduced at trial and the notes of evidence for the trial prior to En Mubashir's appointment (see para (a) of En Mubashir's email of 12 September 2013, reproduced at para 26 ante).

[59] The issue of the particularisation of the fees incurred is addressed in further detail at para 81, post.

[60] Learned counsel for the defendant pointed out that the fees for six days' of trial have already been paid, and thus what remained outstanding were the fees for the remaining 18 days of trial. It was advanced for the defendant that RM252,625 was excessive for 18 days of trial. For example, assuming that En Mubashir spent eight hours per day for each of those 18 days, the total time costs would only have amounted to RM172,800.

[61] However, Skrine would have been entitled to bill for time incurred for work done in preparation for the ongoing trial. It is reasonable to expect that there would be work that would have to be done for the ongoing trial that occurred outside the trial itself. For instance, it would have been necessary for En Mubashir to review the statement of Dato' Rahiman when he was recalled as a witness. This would have necessarily occurred outside the trial itself. The following entries recorded the work undertaken by En Mubashir in Bill No 769457:

06/06/14	Perusing Dato' Rahiman's revised statement upon recall which was emailed to us by the instructing solicitors on 19/05/2014 — and comparing to the previous draft — and perusing to determine points of additions and amendments

07/06/14	Perusing Dato' Rahiman's revised statement upon recall which was emailed to us by the instructing solicitors on 19/05/2014 — and drafting advice to instructing solicitors on the revised statement upon recall

[62] If these entries are checked against the corresponding fee ledger, it will be seen that En Mubashir spent 240 minutes and 180 minutes respectively on those successive days discharging the work described in the entries in the bill. As explained previously, a discount of approximately 40% was eventually applied to all time costs incurred in respect of Bill No 769457.

[63] Having reviewed the time entries as a whole, I am unable to conclude that the time incurred for attendance at trial and in undertaking work relating to the trial was in any way unreasonable.

[64] I also make the observation that the defendant did not allege that any particular time entry had been either incurred unreasonably or had resulted in fees of an unreasonable amount. The thrust of counsel for the defendant's argument was that the total charged for work discharged in preparation for trial and for attendance at trial was excessive, but without identifying which particular time entry was unreasonable. She did not seek explain why, for example, spending seven hours in reviewing, commenting and amending Dato' Rahiman statement upon recall was excessive.

[65] I was of the view that this omission was fatal to this particular ground of appeal. Where a party alleges in a taxation exercise that the bill was unreasonable and ought not be allowed, and where it has been established that the parties have agreed for billings to be made on a time cost basis, it will not suffice for that party to simply make a general allegation that the total bill was unreasonable, without identifying the particular disputed time entries and articulating why the time incurred was unreasonable having regard to the complexity and volume of the work that was needed to be undertaken. In this particular case, although counsel for the defendant had identified the specific disputed time entries, she did not explain why she considered that the time incurred was excessive.

[66] It has also to be borne in mind that Skrine continues to owe a duty of confidentiality to the defendant in respect of the work that it had undertaken for the defendant in this matter. The defendant — as far as I am able to discern from the records before me — has not waived its privilege. This meant that Skrine was unable to adduce the relevant correspondence, advice and other work products in order to counter the allegation that time incurred was unreasonable, without being in breach of legal professional privilege. It therefore became incumbent on the defendant to either adduce the relevant

documents in order to establish that the time incurred was unreasonable, or to waive its privilege in respect of the documents in question. Having elected not to do either of these things, it will not lie in the mouth of the defendant to then allege that the plaintiff had failed to prove that the time entries had been reasonably incurred by reason of its failure to adduce the relevant documents.

[67] In summary, I rejected this ground of appeal because:

(a) counsel for the defendant had omitted to articulate why the time incurred in respect of the specific time entries were unreasonable; and

(b) independently of my finding in para (a) above, I have in any event found that the relevant time entries were not unreasonable in circumstances.

CHARGES FOR AFTER TRIAL SUBMISSIONS

[68] It was advanced for the defendant that the costs claimed for after trial submissions were excessive, and that RM159,339.55 ought to be deducted from the amount payable because Bill No 908518 was issued after En Mubashir's appointment was terminated. The outstanding bills contained a sum of RM883,750 that was said to be attributable to submissions after trial (before taking into account the discount that was given by the plaintiff). The defendant proposed RM15,000 as a reasonable amount for the works done in connection with this part of work undertaken by the plaintiff.

[69] In respect of the contention that the charges incurred for the after trial were excessive, the same points that I had made in paras 65 and 66 ante apply here. While the defendant had identified which entries in the bill that it was disputing, it failed to explain why the time incurred was unreasonable in the circumstances. Even though each bill did not specify the time incurred in respect of a particular entry, the time incurred for each item in the bill could be ascertained from the corresponding fee ledger.

[70] To take just one specific time entry, in Bill No 901464 dated 22 June 2015, the following entry appears:

30/05/2015	Perusing and drafting submissions after trial on the point of exemplary damages including the omnibus prayer, the notice of intention to claim exemplary damages and the substantive laws on the award of exemplary damages for breach of contract

[71] From the corresponding fee ledger, it can be seen that En Mubashir had spent 260 minutes attending to this item of work. This equated to RM6,500 of billable time. The client was charged RM45,000 for the time incurred in the period of bill, whereas the actual time cost incurred was RM98,500. This meant that Skrine had applied a discount of approximately 54% before the bill

was issued. If we applied this discount rate to the specific time entry, we can now see that in respect of the time entry incurred on 30 May 2015, the defendant was in fact charged approximately RM3,530.

[72] Was this amount unreasonable given that En Mubashir had spent over four hours of his time on the issue of exemplary damages in the final submissions? A definitive answer could possibly be obtained had the draft after trial submissions been adduced before me. Absent this document, I can only conclude that the defendant had failed to establish the allegation that this amount was unreasonable.

[73] On the issue of Bill No 908518: it was common ground that the defendant communicated its intent to terminate En Mubashir's engagement by way of a letter dated 16 November 2015 (which was received by Skrine on 19 November 2015). Bill No 908518 covered the period from 16 November 2015 until 26 January 2015, ie after the defendant communicated its intent to terminate En Mubashir's engagement. Was Skrine entitled to charge for these fees?

[74] The material portion of the 16 November 2015 letter from the defendant stated as follows:

> As earlier already explained, we are not in a position to settle the balance amount, which seems to keep increasing with no indication of the maximun exposure on fees to be incurred by us. Our earlier request for a 50% discount on the earlier invoices have also not been considered which severely affects our financial position. We would like to state that we cannot afford to settle your invoices, which have substantially exceeded our budget (maximun RM500k). We appreciate and understand you predicament as a consequence of this and therefore, as much as we would like to continue with your service, but so that we do not continue to owe your firm, we are left with no other alternative but to request for you to discontinue with any further work on this file after completing Puan Zaharaton's cross examination.

[75] From the above, it can clearly be seen that the instructions from the defendant was for En Mubashir to discontinue work only after completing the cross-examination of a witness for the defendants in that action (ie the parties aligned to the Negeri Sembilan state government), one Puan Zaharaton. A series of correspondence thereafter ensued, which was marked by a rising level of acridity between the parties.

[76] En Mubashir replied in a letter dated 23 November 2015. In this letter, he explained that his cross-examination of Puan Raja Zaharaton had in fact already completed. He sought clarification whether the defendant wished for him to continue until Puan Raja Zaharaton had completed his testimony.

A [77] He also sought further instructions regarding the work that he had been undertaking in respect of the after trial submission. Work for this submission had commenced much earlier, and En Mubashir had been updating the submission from time to time to address the evidence received throughout the progress of the trial. The question was thus whether he ought to complete the
B submission in respect of the evidence received from all prior witnesses. The material portion of En Mubashir's letter read as follows:

> 6. In respect of the draft submission after trial, which work has been on-going, I have incoporated the relevant evidence and document as at the trial date of
C 3.11.2015. I am now in the midst of perusing Zulkifli's evidence on 14.11.2015, as well as the documents in bundle W, and incoporating them into the submission. *Do you want me to complete that before Krishna and Terrance take over the submission? I think that it might be easier for them if I were to do so. Again, please let me have your plain instructions on this.*

D

[78] The defendant responded three days later, in a letter dated 26 November 2015. In this letter, the defendant provided the following instructions:

> Please therefore have our instructions to discontinue with ALL work on this file, as
E earlier instructed. We note that the cross-examination and re-examination of Raja Zaharaton is still on-going but we are left no choice but to continue without the benefit of having you as our lead counsel. This includes the cross-examination of Zulkifli (DW-3) and all other related work. However, in respect of submissions for
F Zulkifli's evidence on 14th November 2015, kindly complete the same before handling the matter over to Krishna and Terrence.

[79] These instructions, in my view, clearly and unequivocally meant that En Mubashir was to complete the after trial submissions to incorporate all
G matters up to the evidence given by Zulkifli on 14 November 2015. Not unreasonably, En Mubashir then proceeded on the basis of these instructions and billed for the time incurred, which eventually found their way into Bill No 908518.

H **[80]** I was thus of the view that the items contained in Bill No 908518 had been properly incurred and billed to the defendant. The defendant's appeal on this ground was accordingly dismissed.

WERE THE BILLS SUFFICIENTLY PARTICULARISED?

I

[81] It was contended that Skrine had not provided an adequate breakdown of the fees incurred, and that absent a detailed bill of costs, the taxation exercise ought not be carried out.

[82] I was of the view that this contention was not made out. Even though the bills may not have contained the breakdown in the fees charges, such information could readily be obtained by referring to the accompanying fee ledger, which showed not only the actual time incurred but also the gross time costs before discount. A comparison between the total fees set out in the fee ledger and the billed amount will show the discount given to the defendant. There was, in other words, sufficient information given by Skrine to the defendant for the defendant to check and, if thought necessary, to query the amount charged.

[83] In any event, even if the defendant did consider that there had been insufficient particularisation in the bills themselves, the defendant had had ample opportunity to query or dispute the bills at the time each of them were issued. They did not do so. The defendant cannot now be permitted to complain on the lack of particularisation in the bills and to rely on this purported infirmity in the bills in order to escape from its liability for fees that were properly incurred.

TRAVELLING CHARGES

[84] It was contended that Skrine was not entitled to charge for the travelling time incurred by En Mubashir on a time cost basis. The sum in dispute under this head was RM23,575.

[85] I saw no reason why En Mubashir could not charge for the time that he had expended in travelling to and from court. Time cost was the agreed basis upon which the services of Skrine would be charged, and it should not matter matter whether En Mubashir's time was expended in, say, preparing submissions or travelling to and from court. I have examined the time entries in the respective fee ledgers, and was of the view that the time incurred was representative of how long it would have taken to travel to the Seremban court complex from Kuala Lumpur. The fees thus incurred were accordingly not unreasonable.

[86] En Mubashir would have been entitled to charge for travelling time, for as long as the time spent travelling would not have been incurred but for his engagement by the client. Thus, he would not have been entitled to charge for his daily commute to Skrine's office from home, for that would be time that would have been expended in any event, and regardless of the engagement by the defendant. The travelling time incurred in the present instance, however, were incurred as a result of the engagement of En Muhashir by the defendant, and would not have been incurred but for this engagement.

[87] The defendant's contentions on this ground of appeal was not made out.

CONCLUSION

[88] For the reasons explained in this judgment, I dismissed the whole of the defendant's appeal. I directed that costs of the appeal be borne by the defendant.

Appeal dismissed with costs to the defendant.

Reported by Muhamad Azham Marwan